Toffoloni v. LFP Publishing Group, LLC Doc. 73 Att. 7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. **LFP PUBLISHING GROUP, LLC,** d/b/a Hustler Magazine, et al, Defendant.	)))))))))))))	CASE NO. 1:08-cv-00421-TWT

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER

EXHIBIT F

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)))))))))))))))))	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

DEEFNDANT LFP PUBLISHING GROUP, LLC'S RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

COMES NOW Defendant LFP Publishing Group, LLC ("LFP") and respectfully responds to Plaintiff's First Requests for Production as follows:

RESPONSES TO SPECIFIC REQUESTS

(1)

All documents, identification of which is requested, or which otherwise reflect, refer to, evidence, comment upon, or relate in any way to the information requested in Plaintiff's First Interrogatories to Defendants.

RESPONSE:

LFP objects to producing "all documents" that "reflect, refer to, evidence, comment upon, or relate in any way to the information" stated in its responses to Plaintiff's interrogatories. The Request is substantially overbroad and does not identify documents with reasonable particularity. If there is specific "information" provided in LFP's interrogatory responses with respect to which Plaintiff believes, in good faith, additional documents should be produced, LFP will respond in good faith to an appropriately limited future request from Plaintiff. Documents subject to the attorney-client and/or work product privileges will not be produced in response to this Request. Documents identified in LFP's interrogatory responses will be produced.

(2)

Profit and loss and/or operating statements for LFP Publishing Group, LLC for each month in calendar years 2006, 2007, 2008, and 2009 to date.

RESPONSE:

LFP objects to this Request as seeking information irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The financial condition of LFP does not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and is thus wholly irrelevant to the subject matter of this litigation.

Plaintiff's suggestion in her interrogatories to LFP that the requested information is relevant "for purposes of [her] claim for punitive damages" is contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

No documents will produced in response to this request.

(3)

Profit and loss and/or operating statements for L.F.P., Inc. for each month in calendar years 2006, 2007, 2008, and 2009 to date.

RESPONSE:

LFP objects to this Request as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The financial condition of non-party L.F.P., Inc. does not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and is thus wholly irrelevant to the subject matter of this litigation. LFP further notes that it is a separate and distinct legal entity from non-party L.F.P., Inc., and LFP does not have legal possession or control of non-party L.F.P., Inc.'s information.

Even if there were any basis for Plaintiff to seek discovery from non-party L.F.P., Inc., which there is not, Plaintiff's suggestion in her interrogatories to LFP that the requested information is relevant "for purposes of Plaintiff's claim for punitive damages" is incorrect and contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley,* 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP, much less L.F.P., Inc., in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of even Defendant LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

LFP does not possess and will not produce any documents responsive to this Request.

(4)

Profit and loss and/or operating statements for LE Publishing Advisors, LLC for each month in calendar years 2006, 2007, 2008, and 2009 to date.

RESPONSE:

LFP objects to this Request as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The financial condition of non-party LE Publishing Advisors, LLC does not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and is thus wholly irrelevant to the subject matter of this litigation. LFP further notes that it is a separate and distinct legal entity from LE Publishing Advisors, LLC, and is not in legal possession or control of that entity's information.

Even if there were any basis for Plaintiff to seek discovery from non-party LE Publishing Advisors, LLC, which there is not, Plaintiff's suggestion in her interrogatories to LFP that the requested information is relevant "for purposes of Plaintiff's claim for punitive damages" is incorrect and contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP, much less LE Publishing Advisors, LLC, in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of even a party's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

LFP does not possess and will not produce any documents responsive to this Request.

(5)

A statement of net worth or financial statement for LFP Publishing Group, LLC d/b/a "Hustler Magazine" for the years 2006, 2007, 2008, 2009, to date.

RESPONSE:

LFP objects to this Request as seeking information irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of LFP do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation.

Plaintiff's suggestion in her interrogatories to LFP that the requested information is relevant "for purposes of [her] claim for punitive damages" is contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")). In accordance with Fed. R. Civ. P. 33(d), LFP directs Plaintiff to documents to be produced by LFP evidencing its total worldwide sales of the March 2008 *Hustler* Magazine containing the images at issue in this case.

LFP will not produce documents responsive to this Request.

(6)

A statement of net worth or financial statement for L.F.P., Inc. for the years 2006, 2007, 2008, 2009, to date.

RESPONSE:

LFP objects to this Request as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of non-party L.F.P., Inc. do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation. LFP further notes that it is a separate and distinct legal entity from non-party L.F.P., Inc., and LFP does not have legal possession or control of non-party L.F.P., Inc.'s information.

Even if there were any basis for Plaintiff to seek discovery from non-party L.F.P., Inc., which there is not, Plaintiff's suggestion in her interrogatories to LFP that the requested information is relevant "for purposes of Plaintiff's claim for punitive damages" is incorrect and contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of even Defendant LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.

408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

LFP does not possess and will not produce any documents responsive to this Request.

(7)

A statement of net worth or financial statement for LE Publishing Advisors, LLC for the years 2006, 2007, 2008, 2009, to date.

RESPONSE:

LFP objects to this Request as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The financial condition of non-party LE Publishing Advisors, LLC does not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and is thus wholly irrelevant to the subject matter of this litigation. LFP further notes that it is a separate and distinct legal entity from LE Publishing Advisors, LLC, and is not in legal possession or control of that entity's information.

Even if there were any basis for Plaintiff to seek discovery from non-party LE Publishing Advisors, LLC, which there is not, Plaintiff's suggestion in her interrogatories to LFP that the requested information is relevant "for purposes of Plaintiff's claim for punitive damages" is incorrect and contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP, much less LE Publishing Advisors, LLC, in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of even a party's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

LFP does not possess and will not produce any documents responsive to this Request.

(8)

Documents which reflect the financial and/or other compensation paid by Defendant LFP Publishing Group, LLC or any related or affiliated company for the 50 highest paid models, celebrities or private individuals for posing for nude images of said person, published in each edition of Hustler Magazine for 2006, 2007, 2008, and 2009.

RESPONSE:

LFP objects to this Request as overbroad, seeking information of non-parties, and because it seeks private and confidential, non-public financial information of LFP and non-parties. LFP further notes that the images of Ms. Benoit at issue in this case and published by LFP are not comparable in type, nature, quality or value to images obtained by LFP from its "50 highest paid models, celebrities or private individuals for posing nude" for publication *Hustler* Magazine during the years 2006, 2007, 2008, and 2009, and thus LFP's payments, if any, to such models, celebrities or private individuals is not probative of any issue in this case.

LFP will produce documents which reflect the compensation paid for the images of Ms. Benoit at issue in this case. Counsel for LFP will also agree to meet and confer with counsel for Plaintiff to discuss an appropriate scope for LFP's response to this request, and entry of an appropriate protective order governing the use of confidential financial information produced in discovery in this case.

(9)

Produce an original of the March 2008 edition of Hustler Magazine as it was offered to the public. Plaintiff will reimburse Defendant the actual cost of this item.

REPONSE:

LFP will produce the requested information.

(10)

Produce an original of each edition of Hustler Magazine for 2007 and 2008, as they were offered to the public. Plaintiff will reimburse Defendant the actual cost of these items.

RESPONSE:

LFP objects to this Request as overbroad, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and seeking information readily obtainable by Plaintiff by means less burdensome to LFP. Subject to and without waiving its objections, LFP will produce the requested information.

(11)

Produce all documents which reflect the amount of money and/or other things of value paid by Defendant to Mark Samansky for the images of Nancy E. Benoit.

RESPONSE:

LFP will produce the requested information.

(12)

Produce all documents, which reflect the amount of money and/or other things of value received by Defendant for its use of the images of Nancy E. Benoit in all media.

RESPONSE:

LFP is unaware of any documents responsive to this Request in its possession.

(13)

Produce all documents which reflect the total number of Hustler Magazines produced and the total number of Hustler Magazines sold worldwide for each month in calendar years 2006, 2007, 2008 and 2009, to date.

RESPONSE:

LFP will produce a document demonstrating the worldwide total monthly sales of *Hustler* Magazine from 2006 through the present, but otherwise objects to producing "all documents" reflecting the total number of *Hustler* Magazines produced and sold during that time period as overbroad, seeking information irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and highly burdensome to collect.

Respectfully submitted November 30, 2009.

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Attorneys for LFP Publishing Group, LLC

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **Responses to Plaintiff's Request for Production of Documents** upon Plaintiff's attorney of record via Federal Express to:

Richard Decker, Esq.
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

This 30th day of November 2009.

S. Derek Bauer

Attorney for Defendant
LFP PUBLISHING GROUP, LLC

ATLANTA:5189761.1